

Attachment A

Letter dated March 21, 2001

Page 2

Cardholder Agreement language, and it would not expect to match that data with 0+ dialing instructions;

- the name of the firms handling the types of traffic, similar to the current manner (it is currently in a box with the "How to Use . . ." information), would continue to be set out in the New Fulfillment Materials;
- in clear language, on the front of the New Fulfillment Material, in type size and font no smaller than the majority of the rest of the text on that page, the Company would disclose that the New Card is provided as a convenience to the Company's local telephone customers, and that the Qwest Corporation does not provide interLATA service from any of the fourteen states where it provides local telephone service (again, the exact wording would be edited to ensure a meaningful explanation); and
- the name of the firms handling the types of traffic would be set out in the same type size and font as the preceding disclaimer, along with that preceding disclaimer.

Currently, the Company has no plans to advertise the card in any mass media, in bill insets, or in mass direct mail drops, although it is listed and will continue to be listed as an available product or service in catalogs, web sites, and similar compendiums of products and services.

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on the 22nd day of March, 2001, I have caused a copy of the foregoing **LETTER OF QWEST CORPORATION** (File Nos. E-97-28 and E-97-40A) to be served, via first class United States mail, postage prepaid, upon the persons listed on the attached service list.



Kelseau Powe, Jr.

*Served via hand delivery

*Christopher N. Olsen
Federal Communications Commission
Enforcement Bureau
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Washington, DC 20554

*Katherine Farroba
Federal Communications Commission
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March 27, 2001

VIA FACSIMILE AND U.S. MAIL

Robert B. McKenna, Esq.
Associate General Counsel
Qwest
1801 California Street, Suite 4900
Denver, Colorado 80202

Re: AT&T Corp. v. U S WEST Communications,
Inc., File No. E-97-28

Dear Bob:

Late yesterday afternoon, AT&T received by mail Qwest's March 21, 2001 letter to the Commission stating that, despite the Commission's February 16 finding that the 8004USWEST program violates Section 271 of the Communications Act, Qwest intends to continue marketing that service for an indefinite period until it has completed issuing new Qwest calling cards to subscribers. The March 21 letter also describes (albeit for the most part in vague and ambiguous terms) various actions that Qwest is implementing in the interim which allegedly resolve the Commission's finding that the 8004USWEST card offering is unlawful.

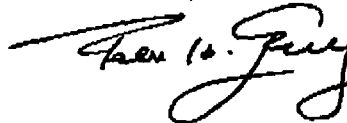
AT&T does not agree that the revisions described in Qwest's March 21 letter are sufficient to obviate the current illegality of the 8004USWEST offering. In all events, however, Qwest is not free to determine unilaterally whether its actions will obviate the Commission's finding that the 8004USWEST card program is unlawful. The February 16 Order (at paragraph 32) expressly declined to address revisions that Qwest claimed had converted the service to a lawful offering, and it explicitly pointed out the appropriate procedure for determining whether any changes in that offering proposed by Qwest would eliminate the illegality. As stated there,



Qwest "is free to file a Petition for a Declaratory Ruling requesting an opinion as the lawfulness of proposed changes to its [s]ervice."

The March 21 letter is thus a transparent evasion of the Commission's instruction in the February 16 Order. Please contact me by the close of business on Thursday, March 29, to advise whether Qwest intends to request a declaratory ruling from the Commission and to refrain from further marketing of the 8004USWEST card pending the Commission's ruling.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Peter L. Fung".

cc: Christopher M. Olsen, Esq.
Enforcement Bureau

D

March 30, 2001

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: MCI Telecommunications Corp. v. U S WEST Communications, Inc., File
No. E-97-40A, AT&T Corp. v U S WEST Communications, Inc.,
File No. E-97-28

Dear Ms. Roman Salas:

This letter responds on behalf of WorldCom, Inc. ("WorldCom") to the letter from Qwest Corporation ("Qwest") filed in the above-captioned cases on March 21, 2001.¹ WorldCom does not agree that the proposed modifications by Qwest to its 1-800-4US-WEST service bring it into full compliance with section 271. Nor does WorldCom believe that Qwest should simply tell the Commission what it believes is necessary to bring its service into compliance. That being said, WorldCom will not address the specific substantive issues at this time.

WorldCom and Qwest had a conference call in December, 2000, to discuss an amicable resolution of this matter, including agreement on modifications to the service that WorldCom could agree would possibly cure the violation found by the Commission. We also were to discuss settlement on the issue of damages. After considering the modifications to the 1-800-4US-WEST service that Qwest described in its reply brief, WorldCom informed Qwest that it was prepared to meet to discuss them. Although Qwest had agreed to subsequent settlement discussions, when WorldCom later contacted Qwest on several occasions, Qwest continually claimed it was not ready for such discussions.

Qwest did not contact WorldCom again on this matter until Qwest filed the March 21 Letter with the Commission. We were frankly surprised that Qwest sent the March 21 Letter before these substantive settlement discussions had even begun. WorldCom would prefer to exhaust efforts to resolve any dispute amicably before submitting additional arguments in writing.

¹ See, Letter, dated March 21, 2001, from Richard H. Bush, Vice President – Voice Products, Qwest, to Ms. Magalie Roman Salas, Secretary, Federal Communications Commission ("March 21 Letter").

Ms. Magalie Salas
March 30, 2001
Page 2

WorldCom of course reserves its right to respond at a later time to the proposals in Qwest's March 21 Letter if again we are unable to resolve this matter without further litigation.

Sincerely,

Kecia Boney Lewis

cc: Christopher M. Olsen
Hance R. Haney

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

AT&T CORP.,

Complainant,

v.

QWEST CORPORATION

(f/k/a US WEST Communications Inc.),

Defendant.

File No. E-97-28

**PROPOSED FINDINGS OF FACT
CONCLUSIONS OF LAW OF AT&T CORP.**

Pursuant to 47 C.F.R. § 1.721(a)(6), Complainant AT&T Corp. ("AT&T") hereby submits the following proposed findings of fact, conclusions of law, and legal analysis relevant to the claims in its Supplemental Complaint against Qwest Corporation (f/k/a US WEST Communications Inc.) ("Qwest") in this proceeding.

FINDINGS OF FACT

Introduction and Summary

1. In its Memorandum Opinion and Order in *AT&T Corp. v. US WEST Communications, Inc.*, File No. E-97-28 (rel. Feb. 16, 2001) ("*1-800-4USWEST Order*"), the Commission found that Qwest's 1-800-4USWEST service constituted a provision of in-region, interLATA service by a Bell operating company in violation of Section 271 of the Communications Act, and the Commission stated that it would address the damages to be

awarded AT&T when AT&T filed a supplemental complaint for damages.

2. In its Supplemental Complaint filed on April 17, 2001, AT&T showed that it was damaged by Qwest's unlawful 1-800-4USWEST service in the amount of at least \$23.01 million over the period from April 1, 1997, through March 31, 2001, plus interest in the amount of \$3.31 million, for a total of at least \$26.32 million in damages.

3. In addition, AT&T showed in its Supplemental Complaint that it is being damaged in the amount of approximately \$16,000 per day for every day that Qwest has continued to provide its 1-800-4USWEST unlawful service past April 1, 2001.

Parties

4. AT&T is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New Jersey. AT&T is a provider of interLATA telecommunications services, as well as other telecommunications and non-telecommunications services.

5. Qwest is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1801 California Street, Suite 2000, Denver, Colorado 80202. On June 30, 2000, Qwest merged with US WEST, Inc., and Qwest is now the legal successor to US WEST.

6. As a result of the merger of Qwest with US WEST, Qwest is a "Bell operating company" ("BOC") under Section 153(4) of the Communications Act, 47 U.S.C. § 153(4). Qwest provides local telecommunication services as a BOC in 14 western states: Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming (the "Qwest region"). As a BOC, Qwest is prohibited from providing interLATA services in the 14 states of the Qwest region until it has

obtained the Commission's authorization under Section 271 of the Communications Act, 47 U.S.C. § 271.

Events Leading To The Filing Of AT&T's Supplemental Complaint

7. Qwest began offering its 1-800-4USWEST service in April 1997. *1-800-4USWEST Order*, ¶ 4.

8. Shortly thereafter, AT&T filed a Complaint with the Commission alleging, among other things, that Qwest's 1-800-4USWEST service violated Section 271 of the Communications Act and that AT&T was being damaged by Qwest's unlawful provision and marketing of this service. *See* AT&T Complaint, ¶¶ 22, 26-30.

9. On February 14, 2001, the Commission granted AT&T's Complaint and found that Qwest's 1-800-4USWEST service constituted an unlawful provision of in-region, interLATA service in violation of Section 271 of the Communications Act. *1-800-4USWEST Order*, ¶¶ 30, 35. The Commission further stated that it would address the amount of damages when AT&T filed a Supplemental Complaint for damages. *1-800-4USWEST Order*, ¶ 31.

10. In its *1-800-4USWEST Order*, the Commission also declined to decide whether certain prospective changes which Qwest had proposed to make to its 1-800-4USWEST service would convert the service into a lawful service offering. *1-800-4USWEST Order*, ¶ 32. Rather, the Commission indicated that Qwest should file petition for declaratory ruling to obtain the Commission's opinion as to the lawfulness of any proposed changes to its unlawful service. *Id.*

11. Following the issuance of the Commission's *1-800-4USWEST Order*, Qwest did not cease providing its unlawful 1-800-4USWEST service, nor did it file a petition for declaratory ruling regarding proposed changes to its service. Instead, in a letter to the Commission dated March 21, 2001, Qwest stated that it intended to continue offering its 1-800-

4USWEST service notwithstanding the Commission's order finding the service to be unlawful. *See* Letter from Richard H. Bush, Qwest, to the Commission, dated March 21, 2001 (attached hereto as Attachment B). Qwest attempted to justify its continued provision of the service on the ground that the Commission "neither directed that Qwest discontinue the Service, nor did it direct that any specific modifications to the Service be made." *Id.* at 1. Qwest further stated that it was in the process of making certain changes to its 1-800-4USWEST service that would cure the problems identified in the Commission's *1-800-4USWEST Order*. *Id.* at 1-4.

12. By letter dated March 27, 2001, AT&T objected to Qwest's continued provision of its 1-800-4USWEST service and disagreed with Qwest's assertion that its proposed future changes to the service would cure the problems identified in the Commission's *1-800-4USWEST Order*. *See* Letter from Peter H. Jacoby, AT&T, to Robert B. McKenna, Qwest, dated March 27, 2001 (Attachment C). WorldCom also objected to Qwest's attempt to disregard the Commission's order. *See* Letter from Kecia Boney Lewis, WorldCom, to the Commission, dated March 30, 2001 (Attachment D).

13. Whether or not the changes proposed by Qwest will cure the deficiencies identified by the Commission in the future, however, the undisputed fact is that AT&T has been damaged and continues to suffer damages as a result of Qwest's unlawful provision of its 1-800-4USWEST service.

AT&T's Damages Through March 31, 2001

14. In its Supplemental Complaint, filed on April 17, 2001, AT&T showed that it has been damaged by Qwest's unlawful 1-800-4USWEST service in the amount of at least \$26.32 million for the period from April 1997 through March 31, 2001, based on available information and conservative assumptions. This amount of damages consists of \$23.01 million in lost profits

and \$3.31 million in interest.

15. In support of its Supplemental Complaint, AT&T submitted the Declaration of David I. Toof (“Toof Declaration”). AT&T Supplemental Complaint, Attachment A. Dr. Toof is an expert in the development and review of damage models used in commercial litigation in general and in the telecommunications industry in particular. *See* Toof Declaration, ¶ 1.

16. Dr. Toof’s estimate of AT&T’s damages consists of three basic calculations. First, he determined, on a quarter-by-quarter basis, the number of calling card minutes of use that AT&T lost as a result of Qwest’s unlawful 1-800-4USWEST service. *See* Toof Declaration, ¶¶ 5-12. Next, Dr. Toof multiplied those minutes of use by AT&T’s average per minute earnings on domestic calling card services to derive AT&T’s lost profits. *Id.*, ¶ 13. Finally, Dr. Toof calculated the amount of interest due and owing to AT&T on its lost profits using the statutory rate of interest generally employed by the Commission – the IRS Quarterly Corporate Overpayment Rate. *Id.*, ¶ 14.

17. Because Qwest has refused to produce information regarding the specific revenues and minutes of use that it realized from its unlawful 1-800-4USWEST service, AT&T has been forced to rely on other available data regarding the revenues that Qwest and Frontier expected to receive from the 1-800-4USWEST service to estimate the number of calling card minutes that AT&T lost as result of Qwest’s provision of its unlawful 1-800-4USWEST service. Toof Declaration, ¶ 5. Information solely in the possession of Qwest regarding the revenues and minutes of use that it realized from its unlawful 1-800-4USWEST service may show that AT&T’s damages were substantially higher.

18. As explained in Dr. Toof’s Declaration, documents indicate that Qwest guaranteed that Frontier Communications Services, Inc. (“Frontier”) would earn \$50 million

in incremental revenues for the 1-800-4USWEST service during the first 30-month period beginning in April 1997 (when Qwest introduced the service) through the September 1999. Toof Declaration, ¶ 6. Of that \$50 million, approximately \$40 million of the revenues are allocated to in-region, interLATA calls, which Qwest could not lawfully provide, and approximately \$5 million of the revenues are allocated to out-of-region interLATA calls, which Qwest would never have provided if it had not unlawfully offered in-region, interLATA calls. *Id.*, ¶¶ 7-9. It is further reasonable to assume an initial 18-month ramp-up period for the revenues from the service, after which the service would have more modest annual revenue growth rates. *Id.* at 9. Based on these reasonable assumptions, quarterly incremental revenues for Qwest's unlawful 1-800-4USWEST service were calculated by Dr. Toof and are set forth in Columns A and D of Exhibit DIT-3.

19. The quarterly incremental revenue figures were then converted into incremental minutes of service for each quarter based on the fact that publicly available documents show that for a five minute call, the average rate per minute received by Frontier was \$0.36 for in-region interLATA calls, while other documents show that the average rate per minute received by Frontier for out-of-region interLATA calls was \$0.1066. Toof Declaration, ¶¶ 10-11.

20. The next step was to determine what portion of the Qwest minutes of use would have been carried by AT&T but for Qwest's unlawful conduct. This was done using conservative estimates of AT&T's share of the consumer calling card market during each of the periods in question. *See* Toof Declaration, ¶ 12.

21. In order to determine the amount of lost profits suffered by AT&T as a result of Qwest's unlawful 1-800-4USWEST service, the minutes of use lost by AT&T in each quarter were multiplied by AT&T's average earnings before interest and taxes ("EBIT") on its

interLATA domestic calling card services for 1996 and 1997. Toof Declaration, ¶ 13. This calculation establishes that AT&T had lost profits in the amount of at least \$23.01 million as a result of Qwest's unlawful 1-800-4USWEST service offering for the period April 1997 through March 2001. *Id.*

22. AT&T is also entitled to interest on its lost profits at the Commission prescribed rate. Applying the prescribed IRS Quarterly Corporate Overpayment Rate to the lost profits calculated by AT&T in each quarter for the period April 1997 through March 2001 results in interest in the amount of \$3.31 million. *See* Toof Declaration, ¶ 14.

23. Combining \$23.01 million in the lost profits incurred by AT&T as a result of Qwest's unlawful 1-800-4USWEST service with the \$3.31 million in interest on those lost profits results in a total amount of damage to AT&T caused by Qwest's unlawful 1-800-4USWEST service through March 31, 2001, of \$26.32 million. *See* Toof Declaration, ¶ 15.

AT&T's Damages After April 1, 2001

24. Following the issuance of the Commission's *1-800-4USWEST Order*, Qwest did not cease providing its unlawful 1-800-4USWEST service. Instead, in a letter to the Commission dated March 21, 2001, Qwest stated that it intended to continue offering its 1-800-4USWEST service notwithstanding the Commission's order finding the service to be unlawful. *See* Letter from Richard H. Bush, Qwest, to the Commission, dated March 21, 2001 (Attachment B). Qwest attempted to justify its continued provision of the service on the ground that the Commission "neither directed that Qwest discontinue the Service, nor did it direct that any specific modifications to the Service be made" (*id.* at 1), and Qwest further stated that it intends to make certain future changes to its 1-800-4USWEST service. *Id.* at 1-4.

25. Whether or not the future changes proposed by Qwest will cure the deficiencies

identified by the Commission, it is undisputed that Qwest is currently continuing to provide the service found by the Commission to be unlawful, and AT&T is continuing to suffer damage from Qwest's unlawful conduct.

26. As a result of Qwest's continuing violation of Section 271 of the Communications Act, AT&T is continuing to be damaged at the rate of approximately \$16,000 per day based upon the damages suffered by AT&T during the first quarter of 2001. *See Toof Declaration*, ¶ 21.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

27. The Commission has jurisdiction over this Supplemental Complaint under Sections 206, 207 and 208 of the Communications Act of 1934, 47 U.S.C. §§ 206-208.

28. Once a violation has been established in a complaint case brought under Sections 206-208 of the Communications Act, the complainant is entitled to recover "the full amount of damages sustained in consequence of . . . such violation" so as to put the complainant in the position that it would have been in but for the defendant's unlawful conduct. 47 U.S.C. § 206; *MCI Telecommunications Corp. v. Pacific Bell Tel. Co.*, 8 FCC Rcd 1517, 1518 (1993) (once liability is established in a Section 208 complaint case, "the defendants are liable for damages to the extent that the complainant can establish that it was damaged as a result of the violations").

29. AT&T has shown that for the period from April 1997 through March 31, 2001, it suffered lost profits as a result of Qwest's unlawful 1-800-4USWEST service in the amount of at least \$23.01 million.

30. In addition, AT&T is entitled to interest on its lost profits at the IRS rate for tax refunds. *See, e.g., Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription*, 10 FCC Rcd 3657, 3678-79 (1994); *MCI Telecommunications Corp. v. Pacific Bell Tel. Co.*, 8 FCC Rcd 1517, 1529-30 (1993); *Western Union Tel. Co.*, 10 FCC Rcd

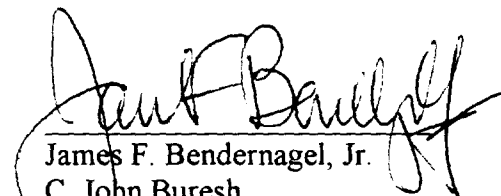
1741, 1747-48 (1995) (all holding that interest at the IRS rate for tax refunds is appropriately awarded to Section 208 complainants to compensate them for the fact that they were deprived of the use of their funds as a result of the defendant's unlawful conduct).

31. Applying the prescribed IRS Quarterly Corporate Overpayment Rate to the lost profits calculated by AT&T in each quarter for the period April 1997 through March 2001 results in interest in the amount of \$3.31 million.

32. Combining \$23.01 million in the lost profits incurred by AT&T as a result of Qwest's unlawful 1-800-4USWEST service with the \$3.31 million in interest on those lost profits results in a total amount of damage to AT&T caused by Qwest's unlawful 1-800-4USWEST service through March 31, 2001, of \$26.32 million.

33. The evidence further shows that AT&T is continuing to be damaged at the rate of \$16,000 per day as a result of Qwest's continuing violation of Section 271 of the Communications Act based on the damages suffered by AT&T during the first quarter of 2001.

Respectfully submitted,



James F. Bendernagel, Jr.
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Counsel for Complainant AT&T Corp.

April 17, 2001

F

CERTIFICATION OF SETTLEMENT ATTEMPTS

MARK C. ROSENBLUM hereby certifies as follows:

1. I am employed by AT&T Corp. ("AT&T") as a Vice President –Law and am one of AT&T's counsel in the above-captioned formal complaint. I make this certification to describe AT&T's attempts to resolve this matter without the need to pursue the damages phase¹ of the formal complaint process before the Commission.
2. I first sought to resolve this matter through negotiations at a meeting with representatives of Qwest in Denver on March 24, 2001. I offered to have this matter referred to binding arbitration. Qwest declined the invitation at that time.
3. I again contacted representatives of Qwest by telephone during the week of April 9, 2001 and again on April 16, 2001. In the April 16 telephone call I made a monetary settlement offer and alternatively renewed my arbitration proposal. Qwest did not accept either proposal, although we agreed that both companies would consider renewing discussions in the future.


Mark C. Rosenblum

Dated: April 16, 2001

¹ On February 16, 2001, the Enforcement Division in AT&T Corp. v. U S WEST Communications Inc., File No. E-97-28, entered an order granting in part AT&T's formal complaint against U S WEST Communications, Inc. (now Qwest Communications, Inc.) on the grounds that the 1-800-54USWEST calling card offering violates Section 271 of the Communications Act of 1934, as amended (47 U.S.C. § 271).

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
AT&T CORP.,)	
)	
Complainant,)	
)	
v.)	File No. E-97-28
)	
QWEST CORPORATION)	
(f/k/a US West Communications Inc.),)	
)	
Defendant.)	

**INFORMATION DESIGNATION
PURSUANT TO 47 CFR § 1.721(a)(10)**

Pursuant to Section 1.721(a)(10) of the Commission's Rules and 47 C.F.R.

§1.721(a)(10), AT&T Corp. (AT&T) hereby submits its Information Designation in support of its Supplemental Complaint.

A designation of the persons believed to have first hand knowledge of the facts involved in this matter and a description of documents in AT&T's possession that are relevant to the facts alleged herein and the manner in which AT&T identified such persons and documents are attached hereto as Exhibits A and B, respectively.

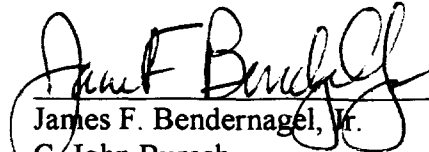
Respectfully submitted,

AT&T Corp.

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Dated: April 17, 2001

By:


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